



**IN THE FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Case No. EA/2014/0218

ON APPEAL FROM:

**The Information Commissioner's
Decision Notice No: FS 50539446
Dated: 1 September 2014**

Appellant: MR TIM NEWARK

1st Respondent: INFORMATION COMMISSIONER

2nd Respondent: BATH & NORTH EAST SOMERSET COUNCIL

Heard at: BRISTOL MAGISTRATES' COURT

**Date of hearing: 14 JANUARY 2015 with further written
representations from 2nd Respondent dated 4
February 2015**

Date of decision: 11 FEBRUARY 2015

Before

ROBIN CALLENDER SMITH
Judge

and

ALISON LOWTON and SUZANNE COSGRAVE
Tribunal Members

Attendances:

For the Appellant: Mr Tim Newark in person
For the 1st Respondent: Written submissions from Mr Adam Sowerbutts, Solicitor for the Information Commissioner
For the 2nd Respondent: Ms D Incedon, Solicitor for Bath & North East Somerset Council

Subject matter: FOIA

Absolute Exemptions

- Personal data s.40

Cases: *Goldsmith International Business School v Information Commissioner and Home Office* [2014] UKUT 0563 (IAC)

DECISION OF THE FIRST-TIER TRIBUNAL

The Tribunal upholds the decision notice dated 1 September 2014 and dismisses the appeal.

REASONS FOR DECISION

Background

1. Until September 2012 Mr David Lawrence had been employed by Bath & North East Somerset Council (the Council) as Assistant Director of Tourism, Leisure and Culture. The Council concede that this was a public-facing and senior role.
2. Mr Tim Newark (the Appellant) wanted to know the reason for Mr Lawrence being absent from his office between July 2012 and his eventual retirement from the Council in September 2012 together with details of his severance package.

The request for information

3. On 3 February 2014 the Appellant asked for five pieces of information from the Council:
 - (i) Can you tell me the reason for David Lawrence, divisional director of tourism, leisure and culture, being absent from his office between July 2012 and his retirement in September 2012?

- (ii) What was the matter the Council was investigating regarding David Lawrence during his absence?
 - (iii) Was it connected with an alleged misuse of Council charge cards?
 - (iv) Can I see the Council's data record for Council charge card use by David Lawrence and his office from the period from May to September 2012?
 - (v) How much was David Lawrence's severance package when he left B&NES [the Council] in September 2012.
4. The Council responded that it did not hold information in respect of (iv) above. It withheld the information in relation to the other four information requests in reliance on section 40 (2) FOIA.

The complaint to the Information Commissioner

5. The Appellant complained to the Commissioner on 29 April 2014. He stated that he believed that the departure of Mr Lawrence was one of significant public interest and that the taxpayer had a right to know about the circumstances in which that individual – who had held a senior management role – had left the Council and taken early retirement.
6. The Commissioner upheld the Council's reliance on section 40 (2) FOIA.
7. In doing so – and in the Commissioner's response to the Notice of Appeal – he took the position that any alleged wrongdoing about which the Appellant complained was exactly that: bare allegations. The Commissioner had seen no evidence – and the Appellant had presented none – to substantiate any such allegations. There was nothing in the material provided to the Commissioner by the Council which could lend support to the veracity (as opposed to the mere existence) of any such allegations.

The appeal to the Tribunal

8. The Appellant, in his original Grounds of Appeal and at the oral hearing of his appeal, made the following points:
 - (i) He believed that one of the purposes of FOIA was to create greater transparency in local government and enable citizens to request information in pursuit of that aim. That had been balanced by a right to private data protection for those working within local government. That right should not be extended to those who had been involved in alleged wrongdoing in the course of their work for local government which could have resulted in a criminal prosecution if the matter had not been dealt with internally and which involved the alleged misuse of taxpayers money. There was a legitimate interest to the public which should over-ride an individual's right to personal data protection.
 - (ii) The Information Commissioner had simply backed up the Council's decision to refuse to give him any information. "This may be correct according to the letter of the law, but it is most certainly against the spirit of the Freedom of Information Act." He questioned whether the matter under investigation did in fact fall under section 40 of FOIA.
 - (iii) A press release from the Council, which was printed in part in the *Bath Chronicle*, declared that "certain matters were being investigated" but did not indicate what the matters were and at the end of the process Mr Lawrence promptly retired. It had come to the Appellant's notice – from an anonymous source within the Council – that Mr Lawrence had been investigated over the alleged misuse of Council charge cards.
 - (iv) The Commissioner had decided that Mr Lawrence's expectation was that his terms of employment would remain confidential but, in the decision notice, had admitted Mr Lawrence was a senior council employee and the details of the pay of such employees are routinely published. The Appellant was concerned that senior local government employees could get away with wrongdoing with no fear of this becoming public because the local council would "collude with the employee" to keep such investigation secret with the purpose of saving both parties public embarrassment and scrutiny.
 - (v) The Council clearly considered matters to have been dealt with internally and of no further public interest. That was wrong and not appropriate for a public, taxpayer-funded body and gave no confidence to the community at large.
 - (vi) The Information Commissioner had relied on the case of *Waugh v IC & Doncaster College* but in the present appeal the Appellant believed

that the testimony of a Councillor (Mr David Laming who attended the Appeal hearing with the Appellant and who had submitted a written witness statement) indicated there was evidence of the alleged wrongdoing.

Evidence

9. The Tribunal was provided in advance of the hearing with an agreed bundle of material which included the information being withheld from the Appellant.
10. The Tribunal reminded itself of the recent guidance for the approach to be taken by courts and tribunals in respect of any closed material procedure.
11. In *Bank Mellat v HMT (no. 1)* [2013] UKSC 38, which was not a case about FOIA, Lord Neuberger said at paragraphs 68-74 that:
 - i) If closed material is necessary, the parties should try to minimise the extent of any closed hearing.
 - ii) If there is a closed hearing, the lawyers representing the party relying on the closed material should give the excluded party as much information as possible about the closed documents relied on.
 - iii) Where open and closed judgments are given, it is highly desirable that in the open judgment the judge/Tribunal (i) identifies every conclusion in the open judgment reached in whole or in part in the light of points made or evidence referred to in the closed judgment and (ii) says that this is what they have done.
 - iv) A judge/Tribunal who has relied on closed material in a closed judgment should say in the open judgment as much as can properly be said about the closed material relied on. Any party excluded from the closed hearing should know as much as possible about the court's reasoning, and the evidence and the arguments it has received.
12. In *Browning v Information Commissioner and Department for Business, Innovation and Skills* [2013] UKUT 0236 (AAC) the Upper Tribunal issued similar guidance about the use of closed material and hearings in FOIA cases, noting that such practices are likely to be unavoidable in resolving disputes in this context:

i) FOIA appeals are unlike criminal or other civil proceedings. The Tribunal's function is investigative, i.e. it is not concerned with the resolution of an adversarial civil case based on competing interests.

ii) Closed procedures may therefore be necessary, for consideration not only of the disputed material itself, but also of supporting evidence which itself attracts similar sensitivities.

iii) Parliament did not intend disproportionate satellite litigation to arise from the use of closed procedures in FOIA cases.

iv) Tribunals should take into account the Practice Note on Closed Material in Information Rights Cases (issued in May 2012). They should follow it or explain why they have decided not to do so.

v) Throughout the proceedings, the Tribunal must keep under review whether information about closed material should be provided to an excluded party.

13. The closed bundle in this appeal contained the disputed information.

There was nothing additional in the closed bundle. In fact the Tribunal did not find it was necessary to consider the disputed information in order to reach its decision in principle.

14. The Tribunal has considered carefully and rigorously the Appellant's points and concerns – already expressed in the Grounds of Appeal and in his other representations – and concluded that to disclose it to the Appellant would not be lawful for the reasons which follow below.

Conclusion and remedy

15. At the beginning of the oral appeal hearing the Tribunal asked the Appellant and the witness he intended to rely on – Councillor Laming – whether any complaint had been made to the police or any other relevant body about the allegations of criminal activity.

16. The context of that question was explained to the Appellant and his witness. The Tribunal did not wish its proceedings to provide libel protection in respect of allegations that might be made by the Appellant or his witness if, in fact, no complaints had been made about the alleged criminal activity to the police or anyone else.

17. The Appellant and his witness indicated that no such complaints had been made.
18. The Tribunal made it clear that, in those circumstances, it would concentrate only on the issues raised in the Grounds of Appeal and not on unsubstantiated allegations that might exist in the background to the appeal.
19. The prime issue in this appeal is whether, under section 40 (2) FOIA, the information requested is exempt from disclosure because it is personal data and because its disclosure would contravene any of the data protection principles in the DPA 1998. There is no doubt in the Tribunal's mind that this information is personal data.
20. The DPA question needs to be considered against the statutory background requiring that, by virtue of the first principle of the DPA, personal data must be processed fairly and lawfully and – in particular – shall not be processed unless at least one of the conditions in Schedule 2 is met.
21. This leads directly to a consideration of the condition at 6 (1) in Schedule 2 of the DPA. Disclosure of Mr Lawrence's information can only be fair if the disclosure is necessary for the purposes of legitimate interests pursued by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case because of prejudice to the rights and freedoms or legitimate interests of the data subject (in this case, Mr Lawrence).
22. A recent UTT decision in relation to this whole area of the operation of Schedule 2 and condition 6 (1) DPA – the authority of which binds this First Tier Tribunal – is *Goldsmith International Business School v IC and Home Office* [2014] UKUT 563 AAC.
23. It is not proposed to set out all eight propositions from that case because they were covered in the Council's submissions at the oral hearing and

were available to the Appellant as part of the document headed Skeleton Submissions on behalf of Bath & North East Somerset Council.

24. Considering those propositions as they apply to this appeal the Tribunal notes that the Council accepts that there is a legitimate interest where the purpose of the disclosure is to allow public scrutiny of the way public money is managed.
25. The Council accepts that Mr Lawrence was a senior officer and that his role was a public facing one. That has to be balanced against the competing public interest in the Council's continuing ability to be able to use compromise agreements.
26. There is nothing sinister or wrong in the use of compromise agreements. They can save public resources in terms of avoiding protracted internal procedures and potentially costly legal actions. The Tribunal finds that the publicity of details about Mr Lawrence as one individual employee of the Council, in contravention of its undertaking of confidentiality given within such an agreement, would undermine the Council's ability now and in the future to use compromise agreements to end some employment relationships.
27. The fact that the Appellant wants to know the details for his own reasons is a factor, but not a sufficiently strong factor, to outweigh the general public interest in upholding the principles which run behind compromise agreements.
28. The Council is required to include the generality (but not the specificity) of the Exit packages figure for all employees in its accounts by Regulation 7 of the Accounts and Audit (England) Regulations 2011 and it has done so. In doing so it achieves a degree of public scrutiny of the Council's spend on all such packages in the financial year.
29. The Council has considered whether processing would be unwarranted in the context of this appeal because of prejudice to the rights and freedoms or legitimate interests of the data subject (Mr Lawrence). The Tribunal has no doubt that Mr Lawrence's Article 8 ECHR private life rights are properly

engaged in this case. Information about the circumstances leading to and around his departure from his employment would clearly have a significant impact on his personal reputation, future earning prospects and ability to maintain his family life.

30. The Tribunal finds nothing untoward in the use of a settlement agreement in this situation. The majority of the information sought relates to material which is not normally made available to the public by any employer.

31. The Tribunal finds having considered the competing factors that it is not in the public interest to disclose this portion of the requested information even when though it relates to someone in a senior role where this would undermine the Council's future ability effectively to offer and use confidential settlements agreements for the present and into the future. The Tribunal finds that the Council has properly used section 40 (2) to withhold this information.

32. In the context of the Council's position as Second Respondent in the Appeal the Tribunal also indicated that it wished to consider further written submissions about whether the post held by Mr Lawrence, as Divisional Director of Tourism, Leisure and Culture, fell within any of the categories of senior employee as defined in the Accounts and Audit (England) Regulations 2011.¹

33. This went to the issue of whether the remuneration including any compensation paid to the holder of his post did or did not need to be individually detailed in the Council's 2012/2013 accounts.

34. Regulation 7 specifies that the accounts of a larger relevant body must identify, by way of job title, the total amount of compensation for loss of employment paid to any senior employee.

35. A "Senior employee" is defined as a designated head of paid service, a statutory chief officer, a non-statutory chief officer or any person

¹ http://www.legislation.gov.uk/uksi/2011/817/pdfs/ukxi_20110817_en.pdf

who has responsibility for management of the relevant body to the extent that the person has power to direct or control the major activities of the body (in particular activities involving the expenditure of money), whether solely or collectively with other persons.

36. Dealing with that point first, the Tribunal finds that at no point was Mr Lawrence designated Head of Paid Service for the Council and did not hold any of the statutory posts listed in the Regulations.

37. Neither did he hold a non-statutory post as defined in the Regulations. The post he held was not required to report directly to the Head of Paid Service nor directly to the Council or any sub-committee of the Council.

38. The Tribunal accepts the evidence from the Council – particularly because there is no evidence to contradict this - that Mr Lawrence reported to the intervening post of Strategic Director for Place which is one of the posts individually listed on page 52 of the Council's 2012/2013 accounts.

39. His role, as clearly described in his job title, concerned tourism, leisure and culture. The Tribunal accepts that, while his job concerned an important activity within the Bath area, it had a small impact financially in comparison to the areas of adult and child social services and education which, together, comprised over half of the Council's budget.

40. At no time was he responsible for the management of the Council to the extent that he directed or controlled the major activities of the Council, either solely or collectively with anyone else.

41. For all these reasons the Appellant's appeal fails.

42. Our decision is unanimous.

43. There is no order as to costs.

Robin Callender Smith

Judge

11 February 2015